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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Joint Petition for Rulemaking to Establish Rules for Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complementary Video Services	))))))	RM - 8380

COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.

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Dated: December 21, 1993

No. of Copies rec'd 0+4
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SUMMARY

- <u>It is beyond the scope of the Commission's authority to implement home wiring rules that apply before subscriber termination of cable service.</u>

The plain language of the home wiring provision and the legislative history of the 1992 Cable Act give the Commission authority to implement home wiring rules that apply <u>after</u> subscriber termination of cable service, and not <u>before</u> such termination. The Commission cannot rely on broad, general authority found in the Communications Act of 1934 because a newer, more specific statute -- the 1992 Cable Act -- now exists, and this statute governs over the older, more general Communications Act of 1934. Implementation of pre-termination home wiring rules would also raise fifth amendment taking concerns which should not be overlooked. Congress did not intend for the Commission to establish home wiring rules that result in an unconstitutional taking without payment of just compensation. Moreover, the Commission cannot simply remedy the unconstitutionality of the taking by setting forth a formula for compensation in its regulations. Implementation of pre-termination home wiring rules also contravenes Congress' warning that it does not intend cable operators to be treated as common carriers with regard to internal cable wiring.

- <u>The home wiring rules sought by USTA are not necessary or practical.</u>

The pre-termination home wiring rules that USTA seeks to have the Commission implement are based on a fundamental

misunderstanding of cable television technology, and are not necessary for situations that actually exist with regard to subscriber use of home wiring. Cable subscribers who choose to receive an alternative multichannel video programming service or a new broadband telecommunications service will either terminate cable television service -- thus triggering application of the current home wiring rules -- or they will need another wire installed in their homes in order to receive both the incumbent cable service and another service simultaneously, because existing cable wiring is typically not physically capable of transmitting an additional multichannel video programming service. Pre-termination rules are also impractical in homes receiving cable service through additional outlets because additional outlets typically use series configuration wiring. With a series configuration, it is impossible to view a service delivered by one provider at the first outlet while simultaneously viewing a service delivered by another provider at any outlet downstream from the first outlet. The Commission should adopt a policy that encourages each competing and complementary service to install its own wires in subscribers' homes.

- The best way to create a "level playing field" for all multichannel video programming providers is to allow each <u>such provider to install its own wiring in a home or MDU.</u>

The Commission's goal should be to create a "level playing field" for telecommunications services, and this goal is best achieved by pursuing a policy whereby each service incurs similar costs in installing home wiring, rather than forcing cable operators to shoulder the entire capital cost associated with home wiring installation, while competing services simply gain access to installed wiring without incurring any installation costs of their own. A policy allowing each service to install its own wiring is not an "insurmountable barrier" to new services; cable operators have borne the cost of "wiring the nation," and continue to bear such costs for new installations and upgrades. Other services should likewise regard the installation of wiring as a necessary cost of doing business. USTA's argument that the cable industry has somehow benefitted from statutes allowing franchised cable operators to construct cable systems over public rights-of-way and through easements is disingenuous because court decisions have held that Section 621(a)(2) of the 1984 Cable Act does not generally give access to the interior of MDU buildings, and any competing MVPD may now apply for a franchise so that it can be eligible for the same benefits and be subject to the same regulations as the franchised cable operator.

- <u>The Commission should be cautious in applying the telephone inside wiring rules to cable home wiring because several important differences between telephone and cable wiring exist.</u>

The telephone inside wiring rules should not be applied directly to cable home wiring because there are too many significant and substantial differences between the two types of wiring to warrant such wholesale application of the telephone wiring rules. The telephone inside wiring rules apply while subscribers are still receiving telephone service, and this is beyond the scope of statutory authority for cable home wiring rules. The telephone inside wiring rules also do not contain provisions for certain concerns associated with cable home wiring -- signal leakage and signal ingress -- because those concerns do not exist in the telephone wiring context. Fundamental technical differences between telephone and cable technology also render the telephone inside wiring rules inadequate for cable home wiring.

- Any pre-termination home wiring rules enacted must address the question of who will be held responsible for prevention of signal leakage and maintenance of cable wiring.

Cable operators are held legally responsible for prevention of signal leakage and maintenance of cable wiring. If subscribers are given access to home wiring prior to termination of cable service, the Commission will have to address the issue of who should be responsible for such items. It would be inherently unfair to hold a cable operator responsible for signal transmission through wiring over which it has been forced to relinquish control.

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COMMENTS

Time Warner Entertainment Company, L.P. ("Time Warner"), hereby respectfully submits these comments in response to the above-captioned Joint Petition for Rulemaking[1] released by the Federal Communications Commission ("Commission") on November 15, 1993. Time Warner is majority owned by Time Warner Inc., a publicly traded company, and consists principally of three unincorporated divisions: Time Warner Cable, which operates cable systems; Home Box Office, which wholly owns two premium television services (the HBO service and Cinemax), and is 50% owner of one non-premium service (Comedy Central); and Warner

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[1] Joint Petition for Rulemaking of Media Access Project, United States Telephone Association, and Citizens for a Sound Economy Foundation, RM - 8380 (rel. Nov. 15, 1993) ("USTA Petition").

Bros., which produces and distributes motion pictures and television programs.

I. INTRODUCTION

The parties to the USTA Petition[2] have asked the Commission to implement rules relating to subscriber access to cable home wiring before the cable television subscriber has terminated cable television service.[3] Rules allowing subscriber access to cable home wiring prior to subscriber termination of cable service are not only beyond the scope of the Commission's statutory authority, specifically granted in Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"),[4] but are also completely impractical, anticompetitive and may result in an unconstitutional taking.

Time Warner opposes the implementation of cable home wiring rules that could apply prior to subscriber termination of cable service, and urges the Commission not to add to or amend the

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[2]In addition to the United States Telephone Association ("USTA"), Media Access Project and Citizens for a Sound Economy Foundation are nominally listed as parties to the petition. It is readily apparent, however, that USTA's members would be the only true beneficiaries of the relief requested. If the petition were granted, USTA members seeking to construct broadband distribution facilities could avoid significant capital costs by seizing substantial portions of the infrastructure constructed by the cable industry. USTA's efforts to obtain a free ride on the information superhighway should be recognized for what they are -- an attempt to obtain the FCC's blessing to engage in wholesale appropriation of property belonging to cable operators.

[3]See USTA Petition at 3.

[4]Pub. L. No. 102-385, 106 Stat. 1460, § 16(d) (1992), codified at 47 U.S.C. § 544(i).

cable home wiring rules it established earlier this year after careful consideration of almost seventy sets of comments and reply comments filed in the initial home wiring rulemaking proceeding.[5]

II. IT IS BEYOND THE SCOPE OF THE COMMISSION'S AUTHORITY TO IMPLEMENT HOME WIRING RULES THAT APPLY BEFORE SUBSCRIBER TERMINATION OF CABLE SERVICE.

When Congress enacted the home wiring provision of the 1992 Act, it carefully worded that provision to state that the "Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."[6] Moreover, the legislative history of the 1992 Act relates Congress' intent that the home wiring rules should only apply after subscriber termination of cable service by stating that Congress "believes that subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit,"[7] and that the home wiring provision "addresses the issue of what happens to the cable wiring inside a home when a subscriber

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[5] See Report and Order in MM Docket No. 92-260, 8 FCC Rcd 1435, ¶ 1 (rel. Feb. 2, 1993) ("Report and Order").

[6] 47 U.S.C. § 544(i) (emphasis added).

[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") (emphasis added).

terminates cable service."[8] Thus, the plain language of the statute and the legislative history of the 1992 Act make it clear that Congress intended that home wiring rules were to apply only where a subscriber has terminated cable service, and that this was the extent of authority given to the Commission with respect to enacting rules pertaining to the disposition of cable home wiring.

The Commission adhered to the plain language of the statute and to Congress' intent in enacting home wiring rules, and emphasized that it was doing so by stating, "We do not think it is necessary or appropriate under the [home wiring] statute to apply [the home wiring rules] before the point of termination."[9] Even so, USTA claims that "[c]able operators have seized upon [the home wiring] provision and, in effect, turned it on its head, arguing that it prohibits the Commission from adopting cable home wiring rules as requested by [USTA]."[10] In fact, it is not the cable operators, but USTA who has turned the home wiring provision "on its head" by arguing that the Commission somehow has the authority to implement home wiring rules that could apply prior to subscriber termination of cable service in the face of the plain language of the statute and the legislative

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[8]S. Rep. No. 92, 102d Cong., 1st Sess. 23 (1991) ("Senate Report") (emphasis added). Similarly, the House Report notes that the home wiring provision does not cover "cable facilities inside the subscriber's home prior to termination of service." House Report at 118.

[9]Report and Order, 8 FCC Rcd 1435, ¶ 5.

[10]USTA Petition at 8.

history which state, in no uncertain terms, that home wiring rules implemented pursuant to the authority specifically granted by the 1992 Act apply only after subscriber termination of cable service.

USTA further argues that the Commission has authority to enact home wiring rules that extend beyond the scope of the home wiring provision because of broad, general authority bestowed by the Communications Act of 1934.[11] However, under an established canon of statutory interpretation, a more specific provision governs over a broad, general provision.[12] Moreover, a more

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[11]Id. USTA relies on United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968), for the proposition that the Commission has broad ancillary jurisdiction to regulate cable television under a general provision of the Communications Act of 1934, which states that the Commission has authority to regulate "all interstate . . . communications by wire or radio." Id. (citing 47 U.S.C. § 152(a)). However, when Southwestern Cable was decided in 1968, statutes specifically addressing the regulation of cable television did not exist. Thus, the premise under which the Court granted the Commission ancillary jurisdiction over cable television was based on entirely different facts than exist now. The 1992 Act, as well as the earlier Cable Communications Policy Act of 1984, is directed specifically at cable television; it instructs the Commission to implement regulations for the cable television industry in painstaking detail. The ancillary jurisdiction derived from the Communications Act of 1934 is, therefore, no longer applicable to cable television, and the Commission cannot rely upon it for authority to regulate beyond the scope of the specific provisions contained in the 1992 Act. See Meyerson, "The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires," 19 Ga. L. Rev. 543, 547-51, 606-08 (1985) (instead of broad authority derived from grants of regulatory authority over other media, the Commission, under the Cable Act, now has a sharply limited regulatory role over cable television).

[12]See Eskridge and Frickey, Cases and Materials on Legislation -- Statutes and the Creation of Public Policy at 616-17 (1988) ("Eskridge and Frickey") (discussion of dynamic theory of statutory interpretation); see also Sunstein, C.,
(continued...)

recent, more specific statute controls over an older statute that does not specifically address the issue.[13] In the present proceeding, this means that the very specific home wiring provision of the 1992 Act, Section 16(d), governs over the more general Communications Act of 1934, as amended.[14]

Furthermore, if the Commission were to ignore the plain language of the more recent and more specific home wiring provision, and implement home wiring rules governing subscriber acquisition of the wiring prior to termination of cable service, it would give in to the same temptation as USTA -- that of overlooking the fifth amendment concerns accompanying pre-termination subscriber acquisition of cable wiring as well as Congress' warning that cable operators are not to be treated as common carriers with respect to internal wiring. The Commission must not succumb to such temptation in this or any other home wiring proceeding.

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[12](...continued) "Interpreting Statutes in the Regulatory State," 103 Harv. L. Rev. 405, 452-53 (1989) ("Sunstein") (canons of construction continue to be a prominent feature in the federal and state courts, and use of the principles contained therein can be found in all areas of modern law); cf. Llewellyn, K., "Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes are to be Construed," 3 Vand. L. Rev. 395, 401-06 (1950).

[13]See Eskridge and Frickey at 616-17; see also Sunstein, 103 Harv. L. Rev. at 412 (statutory meaning does not remain constant over time).

[14]See 47 U.S.C. §§ 151, 152(a).

The fifth amendment taking[15] concerns involved in statutorily forcing a cable operator to yield ownership of its home wiring while it is still providing cable service over that wiring, or before it has even begun to provide cable service, should not be viewed lightly. Cable home wiring is presumed to be the personal property of the cable operator unless or until the cable operator yields its ownership of such wiring by agreement.[16] The Secretary of Defense correctly noted in its comments that a fifth amendment taking problem could arise if ownership of the home wiring were to shift automatically to the subscriber, either before or after subscriber termination of cable service.[17] Congress did not intend for the Commission to establish rules the result of which is an unconstitutional taking without payment of just compensation. Moreover, just

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[15]See U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation").

[16]See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Indeed, Loretto hinges on the very premise that the cable wiring remains the personal property of the cable operator after installation. If the cable wiring had become the property of the subscriber or the building owner upon installation, there would have been no taking; rather, the cable wiring would have been a gift from the cable operator to the subscriber or building owner. However, the Supreme Court in Loretto held that the physical occupation of the apartment building by the cable wiring constituted a taking, for which the cable operator must pay just compensation. Loretto, 458 U.S. at 441. Thus, the cable wiring was still clearly the property of the cable operator after it was installed. See also Time Warner Comments at 3 & n.7; Time Warner Reply Comments at 17-18. All citations to comments, reply comments or petitions for reconsideration cited herein refer to those documents filed with the Commission in conjunction with MM Docket 92-260, the initial cable home wiring rulemaking.

[17]See Secretary of Defense Comments at 3.

compensation must be determined in an adjudicatory proceeding, not by some binding calculation set forth in an agency rule.[18] Thus, the Commission cannot simply remedy the unconstitutionality of the taking by implementing a rule setting forth what compensation shall be given in exchange for taking a cable operator's property; such a rule would itself be unconstitutional.[19]

The rules sought by USTA would require cable operators to dedicate a portion of their facilities to the transmission of video programming or other information for the benefit of competitive MVPDs. In other words, USTA seeks to require cable operators to convert a portion of their proprietary infrastructure into a common carrier facility. Congress has expressly admonished against such a misapplication of the home wiring provision, warning that it "does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes."[20] By this, Congress meant that cable home wiring was not to be treated like telephone inside wiring, over which subscribers have control during the course of receiving telephone service. Indeed, the relief sought by USTA would directly contravene Section 621(c) of

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[18] See Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987) ("The determination of just compensation is clearly a judicial function.").

[19] See id.

[20] House Report at 118-19.

the Cable Communications Policy Act of 1984, which was left unchanged by the 1992 Act:

> Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.[21]

In short, the relief sought by USTA would flatly contravene several express provisions of the Communications Act.

III. THE HOME WIRING RULES SOUGHT BY USTA ARE NOT NECESSARY OR PRACTICAL.

USTA advocates "that cable television subscribers should have access to cable home wiring whether or not they have terminated service."[22] USTA's arguments in support of this position are based on a fundamental misunderstanding of cable television technology and architecture. Unlike inside telephone wiring, internal cable home wiring is physically incapable of simultaneously transmitting two different sets of cable programming services provided by competing MVPDs. The issue of ownership of cable home wiring raised by USTA, relying on esoteric property law concepts, is nothing more than a red herring. Regardless of whether the cable home wiring is deemed to be "owned" by the homeowner or the cable operator, once the homeowner elects to receive cable service, the technology used to deliver broadband multichannel video programming services dictates that only a single MVPD will be able to use that wiring.

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[21] 47 U.S.C. § 541(c).

[22] USTA Petition at 3.

Because the rules advocated by USTA are neither necessary nor practical, they must be rejected.

Normally, in cases where a cable subscriber wants to receive a competing multichannel video programming service, he will cancel his cable service and receive the competing service in place of cable service. Since cancellation of cable service triggers the home wiring rules established by the Commission in the Report and Order, there is no need for additional, pre-termination rules that are unlikely ever to come into play.

In those rare situations where a cable subscriber wants to receive another communications service (other than a wireless service) -- be it another multichannel video programming service or a new broadband telecommunications service -- in addition to cable television service, the manner in which broadband services are delivered requires the installation of an additional cable in his home over which to receive the second service.[23] USTA's position utterly fails to appreciate a fundamental difference between telephone inside wiring and internal cable wiring. When a telephone customer hangs up his phone, the inside wiring connecting various phones within the customer's premises is essentially "dead," i.e., no information is being transmitted between receivers. Thus, for example, if the telephones in a home are equipped with an intercom function, the internal wiring

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[23]Unless, of course, the new service can be provided over existing telephone wiring. Hereafter, we refer to any wired telecommunications service which cannot be delivered over existing telephone facilities as a "broadband" service.

connecting such phones can be used to send intercom messages when the phones are not being used to send or receive outside calls.

Cable wiring, on the other hand, is never "dead," even when all the television sets in a home are turned off. Rather, the entire frequency spectrum delivered by the cable operator is constantly pulsing throughout the internal wiring within the home. It is simply contrary to the laws of physics for another MVPD to simultaneously use internal wiring for transmission of information over the same portion of the frequency spectrum which is already being occupied by the cable operator who installed such wiring.[24] Therefore, any new broadband service received in addition to cable television service, rather than in place of cable service, requires the installation of a second wire into the home.[25]

The physical limitations of coaxial cable wiring also require cable operators to install a second set of internal cable wiring in any situation where the subscriber has a preexisting internal coaxial distribution system which it intends to continue

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[24]Conceivably, a cable operator may not have extended its channel capacity to occupy the entire frequency spectrum capable of being distributed over cable home wiring. In such cases, it may technically be possible for a competing MVPD to distribute signals on frequencies above the upper boundary of the frequencies being used by the cable operator. Of course, this would be grossly unfair because it would unreasonably restrain the ability of the cable operator to expand its channel capacity and offer new services.

[25]In other words, the transmission of cable television service requires that a "discrete, dedicated distribution system be utilized." TKR Cable Co. Opposition to Petitions for Recon. at 5.

to use for other purposes. For example, where a building has installed an internal coaxial local area network ("LAN") to connect computer terminals, a cable operator must nevertheless install a separate coaxial distribution system to provide cable service to that building. It is simply impossible for a single coaxial cable to be utilized for both purposes simultaneously. USTA's contention that a second set of cable home wiring would be "redundant"[26] is totally specious.

The pre-termination rules desired by USTA are particularly impractical in those homes where cable service is received through additional outlets. Where a subscriber receives cable service at more than one outlet in his home, the additional outlets typically use series configuration wiring. In series configuration wiring, signals are delivered to each outlet in a chain -- every outlet is connected to the outlet next to it. If a subscriber wants to receive cable service at one outlet, and a different type of communications service at an additional outlet, which necessarily includes any subsequent outlets in the chain, the communications service provider seeking to deliver its signal to those additional outlets must install at least some of its own wiring, even if it purports to splice into the existing cable wiring between the first and second outlets, assuming the wiring

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[26]See USTA Petition at 4 (referring to "the cost and inconvenience of installing redundant wiring in a consumer's home" as a barrier to the delivery of new telecommunications services).

is even accessible at some point between the outlets.[27] Thus, a subscriber cannot get cable service at one outlet, and some other kind of communications service at another outlet without having two wires running into the house and, where cable wiring is inaccessible between outlets, throughout the house.

USTA appears to take the position that each home should only be served by one wire, accessible to all communications service providers, for all of the subscriber's communications needs. In this regard, USTA argues that rules allowing subscriber access to existing cable home wiring for such a purpose "would remove a barrier to the delivery of new telecommunications services. Specifically, the cost and inconvenience of installing redundant wiring in a consumer's home would be avoided."[28] Time Warner contends that the "barrier to the delivery of new telecommunications services" is not the lack of subscriber access to cable home wiring, but rather, the physical capacity of that wiring to simultaneously carry the services of more than one MVPD.

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[27]The home wiring provision does not guarantee that competing MVPDs will never have to rearrange or supplement existing wiring in order to provide their services. USTA seems to believe that the cable home wiring, in its exact present state, will serve the purposes of the subscriber and the alternate MVPD without modification. This assumption is completely unfounded as "[t]here is no substantial evidence that the existence of home wiring (as distinct from hallway or common area wiring) will necessarily result in the use of that wiring by competitors or, more particularly, that it will result in reduced cost to the subscriber for the installation." New York State Commission on Cable Television ("NYSCCT") Reply Comments at 4.

[28]USTA Petition at 4.

Finally, USTA has attempted to create an issue out of a non-issue with regard to whether subscribers who already own their home wiring, through transfer by the cable operator or pursuant to some specific agreement with the cable operator, may use that wiring to receive "competing and complementary services prior to terminating cable service."[29] The very language from the Commission's Report and Order states that, in circumstances where the cable home wiring already belongs to the subscriber, he "has the right to use the cable with an alternative provider without further compensation and may not be prevented from doing so by the cable operator."[30] This language indicates that subscribers who own their home wiring are free to elect any available service provider to deliver signals. However, as explained above, if the homeowner elects to receive cable service, the cable is simply incapable of simultaneously being used by competing MVPDs. Thus, even where the homeowner owns the internal wiring, when the homeowner decides to subscribe to service provided by a franchised cable television operator, that operator must be granted the exclusive right to use and occupy that wiring.

Given that two wires are inevitable where two types of broadband communications services are being delivered simultaneously, the Commission should not invest valuable time and resources in drafting cable home wiring rules that not only exceed the Commission's statutory authority, but also cannot

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[29] Id. at 6.

[30] Report and Order, 8 FCC Rcd 1435, ¶ 15.

provide practical relief for those who claim to be harmed in the absence of such rules.

IV. THE BEST WAY TO CREATE A "LEVEL PLAYING FIELD" FOR ALL MULTICHANNEL VIDEO PROGRAMMING PROVIDERS IS TO ALLOW EACH SUCH PROVIDER TO INSTALL ITS OWN WIRING IN A HOME OR MDU.

USTA seeks to appeal to the Commission's sense of fairness by arguing that the Commission "should initiate a new rulemaking with the goal of creating a 'level playing field' providing equal access to cable home wiring for all cable subscribers."[31] USTA's idea of what constitutes a "level playing field" with regard to access to cable home wiring is severely skewed, however. Time Warner agrees that the Commission's goal should be to foster competition by creating a "level playing field," but believes that the way to achieve this goal is to pursue a policy whereby cable and its competitors are incurring similar costs to install home wiring, rather than forcing cable operators to shoulder the entire capital cost associated with installation of home wiring, while their competitors simply gain access to that wiring without incurring any installation costs.[32] Put simply, one MVPD should not be able to use home wiring that was installed by another provider without having to pay in some manner for it. Time Warner asserts that the competitive playing field is made more level when all competitors incur essentially the same costs in

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[31]USTA Petition at 6-7.

[32]See Time Warner Reply Comments at 8-9; Time Warner Response to Petitions for Recon. at 5-6.

offering their services to consumers, rather than giving competitors a free ride over the proprietary facilities installed by cable operators.

A policy encouraging each multichannel video programming provider to install its own wiring in a home or MDU building will also allow subscribers to choose from many existing services, thereby fostering competition.[33] Pursuant to such a policy, each competitor would incur similar installation costs that it hopes to recover by pricing its service competitively and winning the subscriber.[34] Conversely, if the Commission implements rules allowing competing MVPDs to simply seize the cable home wiring prior to termination of cable television service, it will, in effect, be establishing a disincentive to cable operators to invest in wiring homes and MDUs that are not yet wired for cable service.[35]

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[33]Time Warner has consistently taken the position that the best way to foster competition among telecommunications services is to allow each such service to install its own wiring. See Time Warner Reply Comments at 4-5. Given that cable home wiring is physically incapable of carrying cable service and a competing MVPD service simultaneously, Time Warner's proposed policy of allowing each telecommunications service to install its own home wiring is also the only feasible solution to the home wiring concerns of cable operators, their competitors and emerging telecommunications.

[34]The NYSCCT has even asserted that "home wiring is not the right vehicle to promote meaningful competition to cable operators throughout the country and should not be the guiding principle in [the home wiring] rulemaking. It is not clear at this time that a subscriber's ownership of home wiring will necessarily enhance competition or serve the subscriber's interest." NYSCCT Comments at 6.

[35]See Time Warner Response to Petitions for Recon. at 11.

Cable operators rarely recover their full installation costs through their installation rates. Rather, cable operators invest in the installation of wiring with the expectation of recovering that investment over time.[36] If the subscriber is allowed to interfere with the ability of cable operators to continue to deliver their services over home wiring before cable service is terminated, the cable operator loses its installation investment, and its competitor gains the use of wiring without ever having to make such an investment.[37] Thus, a rule permitting access by competitors prior to termination of cable service contravenes the Commission's objective of "not discourag[ing] cable investment in continuing to extend service to unwired homes by failing to account adequately for the property, contractual, and access rights of cable operators,"[38] and should, therefore, be rejected.

USTA claims that, by not allowing subscriber access to home wiring prior to termination of cable service, the Commission is

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[36] See Community Antenna Television Association, Inc. Reply Comments at 4 ("CATA") ("Cable is a nonessential service subscribed to by choice. Cable operators must entice people to subscribe to the service so charging an installation fee high enough to recover the entire cost of the installation and wiring is not a very good way to attract new subscribers. Instead cable operators rely on free or discounted installations and recover the costs later through monthly charges.").

[37] Intangible property rights are protected by the taking clause, and compensation must be paid if the holder of the interest had a reasonable, investment-backed expectation that the property would be protected and governmental action impaired that expectation. See Nowack & Rotunda, Constitutional Law 427 n.4 (1991).

[38] Notice of Proposed Rule Making in MM Docket 92-260, 7 FCC Rcd 7349, ¶ 2 (1992) ("NPRM").

essentially hurting the development of new services because the "cost of installing home wiring can . . . serve as an insurmountable barrier to new entrepreneurial firms offering 'cutting edge' telecommunications services to consumers."[39] What this argument completely fails to recognize is that cable television is itself a "cutting edge" telecommunications service. Entrepreneurial cable firms have borne the enormous capital costs associated with "wiring the nation" for cable service -- which is now available to about 98% of all television households[40] -- and cable operators continue to bear such costs as systems are rebuilt, upgraded and new installations are undertaken. Cable operators have obviously been able to offer cable service despite this allegedly "insurmountable barrier." It cannot now be an "insurmountable barrier" to new services (which generally have no universal service obligation) to have to incur the cost of installing home wiring -- a cost which should be deemed a necessary cost of doing business for all companies seeking to deliver their services into consumers' homes through a wire. Competing and complementary communications services should be incurring their own cost of doing business rather than usurping facilities installed at the cable operator's expense.

USTA makes a further disingenuous argument by asserting that the cable industry has somehow benefitted from statutes allowing

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[39]USTA Petition at 4-5.

[40]Cable Television Developments, National Cable Television Association, November 1993 at 1-A.

a franchised cable operator to construct a cable system "over public rights-of-way, and through easements, which [are] within the area to be served by the cable system and which have been dedicated for compatible uses."[41] USTA, without having the audacity to explicitly say so, seems to suggest that competing services should be given access to cable facilities simply because cable operators have been forced to obtain local franchises in order to gain access to rights-of-way and easements, and such identical access may not be available to all unfranchised MVPDs.[42] This argument is completely unfounded for two reasons. First, court decisions have held that Section 621(a)(2) of the 1984 Cable Act[43] does not generally give access to the interior of MDU buildings.[44] Second, the 1992 Act expressly states that competing services may apply for a franchise, and that the franchising authority may award one or more franchises within its jurisdiction, and may not unreasonably refuse to award an additional competitive franchise.[45] Thus, any competing MVPD may apply for a franchise and receive the same

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[41]47 U.S.C. § 541(a)(2); see also USTA Petition at 10.

[42]USTA's argument is particularly disingenuous when viewed from the perspective that USTA's telephone company members have long enjoyed far greater rights to public rights of ways and easements than cable operators, often including the right to exercise eminent domain.

[43]This section, 47 U.S.C. § 541(a)(2), was not amended by the 1992 Act.

[44]See, e.g., Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989).

[45]47 U.S.C. § 541(a)(1).